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PETITIONERS' REPLY BRIEF

In Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

SIDNEY M. HARMON
Vida, Missouri 65583

JOSEPH VICTOR CUSUMANO
Rt. 1, Box 43 F
Portage des Sioux, Missouri 63373
Petitioners in Pro Se

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TABLE OF CONTENTS

	Page
Argument	1
I. The Circuit Court relied totally on particular provisions of the tenure regulations which are inapplicable to your petitioners	1
II. The Court of Appeals erred in distinguishing the case of Perry v. Sindermann, 408 U.S. 593 (1972), and in not bringing its decision in harmony with decisions from other circuits	3
Conclusion	5
Certificate of Service	6

TABLE OF AUTHORITIES CITED

Cases

Board of Regents of State Colleges v. Roth, 408 U.S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701	4
Johnson v. Fraley, 470 F.2d 179, 182 (4th Cir. 1972)	4
Moore v. Knowles, 482 F.2d 1069 (5th Cir. 1973)	4
Perry v. Sindermann, 408 U.S. 593, 33 L. Ed. 2d 570, 92 S. Ct. 2694	3, 4, 5
Zimmerer v. Spencer, 485 F.2d 176, 177 (5th Cir. 1973)	4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1423

JOSEPH VICTOR CUSUMANO and
SIDNEY M. HARMON,
Petitioners,

vs.

DR. C. BRICE RATCHFORD, et al.,
Respondents.

PETITIONERS' REPLY BRIEF

In Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

ARGUMENT

I. The Circuit Court Relied Totally on Particular Provisions of the Tenure Regulations Which Are Inapplicable to Your Petitioners.

The respondents, in their opposition brief (Pages 4 and 6 wherein Section 3B of the Tenure Regulations is quoted), have shown the reliance of the Circuit Court on provisions of the

Tenure Regulations, A-34 through A-57 of the Petition for Writ (hereinafter "the Regulations") which apply exclusively to probationary teachers (teachers on term appointments before the expiration of their maximum probationary periods). The particular provisions which the Circuit Court relied on clearly do not apply to teachers, such as your petitioners, who have completed their maximum probationary periods and were thereafter reappointed. This inapplicability is demonstrated by the Regulations which allow term appointments only before the expiration of the maximum probationary period, and recognize only tenured appointments after the end of such probationary period (Sections 2D, 2A and 3A, pages 4, A-36 and A-37 of the Petition for Writ).

In the instant case, there is no dispute that your petitioners began their final probationary year without notification by the respondents that their employment would be terminated. Because there was no such notification at that time, the Regulations mandated that your petitioners be reappointed after they completed their maximum probationary periods (Section 4E, page A-41, Petition for Writ). As shown above, the Regulations require that such reappointments after the maximum probationary period must be tenured. Respondents' adoption in their Regulations of the "Statement of Principles" and their past practice (Pages 6, 9 and 11 of the Petition for Writ) also require that tenured reappointments follow the completion of the maximum probationary period.

The Regulations clearly classify the terminal one year term appointments, which the respondents issued to the petitioners, as term appointments (Sections 2A, 2B and 2C, pages 4 and A-36 of the Petition for Writ). Also, it is undisputed that these terminal term appointments began after the petitioners completed their maximum probationary periods. Therefore, such a term reappointment expresses a termination of employment and not merely a one-year reappointment which was

impermissible under Regulations recognizing only tenured reappointments following the maximum probationary period.

Neither respondents in their opposition brief, nor the Circuit Court in its opinion, have noted those provisions of the Regulations which prohibit the recommendation of a term appointment during the final probationary year (Sections 4A and 4C, pages A-38 and A-39 of the Petition for Writ). Thus the assertion, that "during any year of a term appointee's probationary period, he [probationary teacher] may be subject to what amounts to a notification of discharge . . . [without due process]" found at page A-18 of the Petition for Writ and at 507 F.2d 980, 984 (1974), selectively ignores the pertinent prohibitions stated above. By denying the petitioners their day in court, in which they can present evidence showing that the policy and practice of the University required a tenure appointment after the maximum probationary period, the decision of the Circuit Court gives petitioners no opportunity to prove their "property interest" as expressed in *Sindermann, infra.*

The respondents in their opposition brief at page 6 also cite Section 12 of the Regulations. This section (A-48 through A-51 of the Petition for Writ) deals only with members of the academic staff at the time of the adoption of the Regulations on March 10, 1950. This section is inapplicable to your petitioners because they were initially appointed many years after such adoption.

II. The Court of Appeals Erred in Distinguishing the Case of Perry v. Sindermann, 408 U.S. 593 (1972), and in Not Bringing Its Decision in Harmony With Decisions From Other Circuits.

Respondents have posited in their brief at page 5 that petitioners have cited cases which have been superseded by decisions

of the Supreme Court. In answer to this assertion, petitioners state that those cases which petitioners cited in their brief have not been superseded by Supreme Court decisions but have, in effect, reinforced the decisions of the Supreme Court, as evidenced by restatements of positions of various circuits, following the decisions in *Perry v. Sindermann*, 408 U.S. 593, 33 L. Ed. 2d 570, 92 S. Ct. 2694 and *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 33 L. Ed.2d 548, 92 S. Ct. 2701. For example, in the case of *Moore v. Knowles*, 482 F.2d 1069 (5th Cir. 1973), the Circuit Court stated, in withdrawing its judgment against plaintiff's claim and in remanding it;

> "In his petition for rehearing, Moore [the teacher] makes two major points. The first is that he is entitled to a remand to afford him the opportunity to offer proof tending to show that while he lacked contractual or formal tenure he nevertheless possessed a 'property' interest in his continued employment as defined by the new *Sindermann* principles. *Sindermann* was decided at the trial level on summary judgment. The Supreme Court remanded the case to afford plaintiff an opportunity to prove his claim of constructive tenure. . . . We agree with plaintiff [the teacher] that he is entitled to his day in court under the new standards laid down by *Sindermann*. We . . . remand the case for further consideration by it [District Court] under the new standards of *Sindermann*." 482 F.2d at 1072.

The Fourth and Fifth Circuits of the Court of Appeals, in cases decided after *Roth, supra* and *Sindermann, supra*, both followed the argument of petitioners in asserting the right of nontenured teachers to claim procedural due process rights against employers under the decision of *Sindermann, supra*. *Johnson v. Fraley*, 470 F.2d 179, 182 (4th Cir. 1972) and *Zimmerer v. Spencer*, 485 F.2d 176, 177 (5th Cir. 1973).

The respondents also quoted from the opinion of the Eighth Circuit Court to the effect that "The entire thrust of the tenure

Regulations is to avoid the *de facto* tenure hypothesized in *Sindermann, supra.*" (Page 6 of respondents' brief). The respondents in adopting the language of the Eighth Circuit Court imply that decades of practice and procedures previously followed can be swept under the boards, to the detriment of petitioners, and without recourse. In the opinion of the Eighth Circuit Court, it is suggested that the refusal to give a tenure appointment to petitioners may have been administrative neglect or oversight as to notice of termination (A-22 and A-23 of the Petition for Writ and 507 F.2d 980, 986 (8th Cir. 1974)). Petitioners have from the time of the filing of this suit, offered to prove that the previous practice has been constant at the University in that no notice was given unless a teacher was to be terminated, and that a continuous contract automatically followed the maximum probationary period.

CONCLUSION

For these reasons and those already presented in the Petition for Certiorari, petitioners respectfully submit that the Court should grant certiorari in this case.

Respectfully submitted

SIDNEY M. HARMON
Vida, Missouri 65581
Petitioner in Pro Se

JOSEPH VICTOR CUSUMANO
Route 1, Box 43 F
Portage Des Sioux, Missouri 63373
Petitioner in Pro Se

Certificate of Service

Three true and correct copies of the foregoing Petition for Writ of Certiorari were mailed this 28th day of August, 1975, postage prepaid to Mr. Jackson A. Wright, 227 University Hall, Columbia, Missouri 65201.

Sidney M. Harmon